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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-653

REIDY INTERNATIONAL, INC., ET AL.,
Petitioners,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS;
WARREN G. HARDING, STATE TREASURER
OF THE STATE OF TEXAS; AND
MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents.

PETITION OF REIDY INTERNATIONAL, INC. FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS;
WARREN G. HARDING, STATE TREASURER OF THE STATE OF TEXAS; AND
MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents.

PETITION OF REIDY INTERNATIONAL, INC. FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Reidy International, Inc. respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Texas entered in this case on June 20, 1979. Other parties to the Texas litigation who may be Petitioners here include National Bancshares Corporation of Texas; Cullen/Frost Bankers, Inc.; Southwest Bancshares, Inc.; Texas American Bancshares, Inc.; First City Bancorporation of Texas, Inc., First United Bancorporation, Inc.; Mercantile Texas Corporation; and Fort Sam Houston Bankshares, Inc., by intervention.

OPINIONS BELOW

The District Court filed no opinion, but made unreported findings of fact and conclusions of law (Appendix A). The opinion of the Texas Court of Civil Appeals (Appendix B) is reported at 569 S.W.2d 584. The opinion of the Supreme Court of Texas (Appendix C) is reported at 584 S.W.2d 268.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 20, 1979. Petitioner's timely motion for rehearing was denied on July 25, 1979 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether 12 U.S.C. § 548 requires that national banks be treated as Texas corporations for purposes of state franchise taxation of nonbanking organizations, where the result is imposition of additional state taxes without action by the Texas Legislature.

2. If so, whether such infringement upon the state's taxing power violates the Tenth Amendment to the United States Constitution.

3. Whether the Texas Supreme Court's failure to follow precedent and established legal principles violated constitutional due process of law requirements.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND ADMINISTRATIVE RULING INVOLVED

A. The Tenth and Fourteenth Amendments to the United States Constitution;

B. United States Code, Title 12, Section 548;

C. Act of Dec. 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, the permanent provisions of which are codified as 12 U.S.C. § 548 (1970 & Supp. V 1975), which Act is referred to in this petition as "Pub. L. 91-156");

D. 1971 Tex. Gen. Laws, ch. 292, art. 7, § 1, at 1206, originally part of House Bill 730, now codified as a footnote in TEX. TAX.-GEN. ANN. art. 20.02 (Supp. 1976), and referred to in this petition as "H.B. 730";

E. Ruling 80-0.18 of the Comptroller of Public Accounts of the State of Texas, promulgated April 18, 1974.

The relevant portions of each provision, statute and ruling are set forth in Appendix E.

STATEMENT OF THE CASE

1. Factual and Legal Background.

Petitioner Reidy International, Inc. ("Reidy") is a corporation whose first-year Texas franchise taxes were increased from eighty dollars to eight thousand dollars as a direct result of what the Texas Comptroller of Public Accounts ("the Comptroller") and the Texas Supreme Court treated as an affirmative requirement of 12 U.S.C. § 548, as amended.

The State of Texas imposes a franchise tax upon all Texas corporations and all foreign corporations doing business in Texas. TEX. TAX.-GEN. ANN. arts. 12.01 - 12.22 (Vernon 1969 & Supp. 1978-1979). The tax is calculated by a formula[1] in which the corporation's capital is multiplied by a fraction whose numerator is the corporation's gross receipts from business done in Texas, while the denomina-

---

[1] $\frac{\text{Gross Receipts from "Business Done in Texas"}}{\text{Gross Receipts from Entire Business}} \times \text{Entire Taxable Capital} \times \text{Tax Rate} = \text{Franchise Tax}$

tor is the corporation's gross receipts from its entire business. The result is multiplied by the franchise tax rate. Article 12.02 does not specify precisely which receipts are to be included in "gross receipts from business done in Texas," nor did its predecessor statute. Thus, in 1917[2] the Comptroller's office adopted the "location of payor" test for determining when receipts such as dividends or interest should be included in the recipient's "gross receipts from business done in Texas." That rule looks only to whether the entity paying the dividends or interest is organized under Texas law. If so, the recipient must include such payments as part of its "gross receipts from business done in Texas" ("Texas gross receipts"). The result is otherwise if the payor is organized under the laws of another jurisdiction. *Humble Oil & Refining Co.* vs. *Calvert,* 414 S.W.2d 172, at 175 (Tex. 1967). The Texas Supreme Court reaffirmed that principle in this case (Opinion, p. 3, App. C at C-3):

> "If dividends or interest are received from a *Texas* corporation, they are Texas receipts. Conversely, if received from a *foreign* corporation, they are not Texas receipts." (Emphasis added).

That Court held in 1967 that the location of payor rule was of such long standing that it could be changed only by the Legislature,[3] which has not changed it.

Petitioner owns no bank stock; its only possible "gross receipt from business done in Texas" was interest paid on a certificate of deposit issued by a national bank located in Texas (Statement of Facts ["S.F."] 38-47; Stipulations No. 7 and 16, App. G, at G-3 & G-4). For periods prior to January 1, 1973, the Comptroller did not consider dividends

[2] Humble Oil & Refining Co. vs. Calvert, 414 S.W.2d 172, at 175 (Tex. 1967).

[3] Humble Oil & Refining Company vs. Calvert, 414 S.W.2d 172, at 180 (Tex. 1967).

or interest paid by a national bank located in Texas to be Texas gross receipts to the payee. National banks were considered to be foreign entities since they were not chartered under Texas law (Stip. No. 8, App. G. at G-3; Finding of Fact No. One, App. A at A-1). See also *Grayson County State Bank* vs. *Calvert,* 357 S.W.2d 160, 162 (Tex. Civ. App. — Austin 1962, writ ref'd).

12 U.S.C. § 548 formerly specified four permissible (and exclusive) methods of state taxation of national banks.[4] In 1969, but effective January 1, 1973, by Pub. L. 91-156 Congress amended 12 U.S.C. § 548 to provide:

> "For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

Acting upon the federal amendment, the Comptroller published Ruling 80-0.18 on April 18, 1974. After acknowledging that dividends and interest paid by national banks previously were not considered "gross receipts from business done in Texas," the Ruling recited the passage of Pub. L. 91-156 and concluded:

> *Accordingly,* dividends and interest paid on or after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b). (Emphasis added)

The Ruling thus imposed great additional franchise taxes upon Petitioner by requiring inclusion of national bank

[4] Texas selected the tax on capital stock of banks, under Art. 7166, V.A.C.S.; a letter from the Texas Banking Commissioner to the Federal Reserve Board concerning this tax (and pertaining to Pub. L. 91-156) is set forth as Appendix F. Texas franchise tax is not imposed on either state or national banks (Stipulations 11 and and 12, App. G at G-4).

interest in its Texas gross receipts. Petitioner paid under protest and brought this litigation.

2. Proceedings in the Courts Below.

The trial court found as fact that Ruling 80.-0.18 "was promulgated as a direct result of the enactment of Public Law 91-156," (Finding of Fact No. 2, App. A at A-1), but ruled for the Comptroller without opinion. The Court of Civil Appeals reversed, noting that the Comptroller relied solely on Pub. L. 91-156 as the basis for his Ruling (Opinion, p. 11; App. B at B-12). Determining that the purpose and intent of the federal amendment was confined to taxation of national banks, the Court concluded that Pub. L. 91-156 did not authorize or require the change promulgated by the Comptroller as to Texas franchise taxation of corporations receiving national bank interest or dividends.[5] (The Court of Civil Appeals held alternatively that even if Pub. L. 91-156 were so construed, H.B. 730 would preclude imposition of the additional tax). The Comptroller appealed, continuing to argue that Pub. L. 91-156 was a "directive" or "edict" to the State to impose the tax as promulgated in Ruling 80-0.18, and that refusal to enforce the Ruling "ignores and affronts the *directive* of P.L. 91-156" in violation of the Supremacy Clause of the United States Constitution (State's Application for Writ of Error, at 18; 21-22). Reidy responded that if Pub. L. 91-156 were construed and applied so as to require imposition of state taxes on nonfederal institutions, and particularly on nonbanking organizations, it would constitute an unconstitutional infringement upon Texas' power of taxation. (Answer to Application for Writ of Error, at 9-10). That contention was not expressly addressed by the Texas Supreme Court in its reversal. However, in upholding the Ruling that Court said that "[t]he Comptroller based this change in

[5] Opinion of Court of Civil Appeals, p. 9-10; App. B at B-10, B-11.

tax policy on P.L. 91-156 . . ." (App. C at C-4), and that Comptroller "ruled correctly" that national bank dividends and interest were Texas gross receipts to the payee after the effective date of the federal amendment. That construction necessarily implied the rejection of Petitioner's constitutional and statutory arguments.

REASONS FOR GRANTING THE WRIT

1. The Texas Supreme Court's implied holding that Pub. L. 91-156 requires the imposition of additional state taxes upon nonbanking institutions without state legislative action violates the Tenth Amendment to the United States Constitution.

By upholding Ruling 80-0.18 the Texas Supreme Court sustained the imposition of additional state taxes upon Petitioner, solely by reason of Pub. L. 91-156. That Court necessarily ruled by implication that the federal amendment required such imposition, there being no other basis for it. Prior to the effective date of Pub. L. 91-156, under Texas law the Comptroller co ld not impose the tax in question. After that date the Comptroller could impose the tax, according to such Court, although the Texas Legislature had not acted either to change the location of payor rule or to impose the tax here challenged. The Texas Supreme Court obviously accepted the Comptroller's premise that the federal amendment was a "directive"[6] and "edict"[7] which changed the Texas franchise tax system. Similarly, the State said in its Application for Writ of Error that:

> "[N]ational banks located in Texas are now, pursuant to federal law, Texas payors —." (Page 24).
>
> "*In Texas, P.L. 91-156* effected and *changed the status of national banks — to Texas corporations* and Texas payors *under the (Texas) location of payor rule.*" (Page 22). (Emphasis added).

[6] State's Application for Writ of Error, p. 18, 19.

[7] Id., at 21-22.

The State then said that "following the language of P.L. 91-156" the Comptroller "fashioned the policy expressed in Ruling 80-0.18" (Application, at 25)

In this regard Mr. Charles Nye, head of the Comptroller's franchise tax section, testified:

> Q But it would be your understanding that the effect of that federal statute was to *automatically change* the Texas location of payor rule?
>
> A For national banks.
>
> Q And because of that change you would thereafter impose the franchise tax in a manner that it had not previously been imposed?
>
> A On corporations which held national bank shares. (S.F. 21, L. 11-18).

Also, S.F. 24, L. 23-25, S.F. 25, L. 1-10:

> Q Let me ask you this, Mr. Nye, you had not — from the period when you had this discussion up until the issuance of the ruling you had not prior to that time actually imposed the tax, the additional tax, on anyone; had you?
>
> A No, it was [Jan.]-1-72 and then later changed to [Jan.]-1-73.
>
> Q When you refer to the effective date as [Jan.]-1-72 and then later changed to [Jan.]-1-73 you are referring to the effective date in the Federal Statute P.L. No. 91-156?
>
> A That's correct.
>
> Q *It is your view that the tax is a direct result of the federal statute; is it not?*
>
> A *Yes.* (Emphasis added).

As Respondents' witness Mr. Nye's testimony is binding upon them; the trial court found as fact that the Ruling was promulgated as a *direct result* of Pub. L. 91-156. Further, the Ruling expressly recited the federal amendment as its authority. As already noted, the Texas Legislature did not authorize the action. There being no other predicate for the Ruling, it is clear that the Texas Supreme Court regarded the federal amendment as mandatory and as requiring the challenged action. Thus, no independent and adequate state ground supports that Court's decision.

It was error thus to construe the federal amendment as requiring the imposition of new and additional state taxes on nonbanking entities. In enacting Pub. L. 91-156 Congress was concerned only with achieving equality in state taxation as between state and national banks. As stated by Congressman Patman:

> "The bill provides that national banks shall be subject to the same taxation as a State bank. *The bill says nothing more.*" (Emphasis added).

115 Cong. Rec. 19908 (1969). [Similar legislative history is expressed in H.R. Rep. No. 91-290 and S. Report No. 91-530, 91st Cong., reprinted in (1969) 2 U.S. Code Cong. and Admin. News 1595.] In its opinion the Texas Supreme Court acknowledged this Congressional purpose, and noted that for many years equality of taxation as between state and national banks has obtained in Texas, by virtue of Art. 342-908, V.A.C.S. (Appendix C, at C-8).

The "villain" which has caused the Texas Supreme Court's strained construction of Pub. L. 91-156 as urged by the Comptroller is the rigid, "form, not substance" location of payor rule. As discussed at p. 4, supra, under that rule dividends and interest are "Texas gross receipts" only if the payor is incorporated under the laws of Texas. Congress certainly had power to withdraw federal restraints on state taxation of national banks in order to achieve

equality in local taxation of state and national banks. However, since a national bank must be chartered under federal law, technically it can never literally be "organized under the laws of Texas," as required by the location of payor rule. That result is solely the doing of the rule promulgated by the Comptroller's office 62 years ago. The Comptroller's own rule thus always would preclude him from imposing the tax here challenged unless the state legislature acted or federal law "commanded." The Legislature has not changed the location of payor rule. The Comptroller's Ruling thus could be sustained by the Texas Supreme Court only on the premise that the federal statute "mandated" that national banks be transformed into Texas corporations for purposes unrelated to state taxation of banks.

Under any such construction of Pub. L. 91-156 Congress would be writing the tax laws of Texas, which would violate the Tenth Amendment to the United States Constitution. Congress cannot lawfully impose or implement state taxation. "There is nothing in the Constitution which contemplates or authorizes any direct abridgement of [the taxing] power [of the states] by national legislation." *Union Pac. R.R.* vs. *Peniston,* 85 U.S. (18 Wall.) 5, 30 (1873). In *Lane County* vs. *Oregon,* 74 U.S. (5 Wall.) 71 (1869), an Oregon statute required that state taxes be paid in gold and silver coin. A federal statute declared that United States' notes were "lawful money and legal tender for payment of all debts, public and private, within the United States." The United States Supreme Court held that the federal statute constitutionally could not govern state taxation, so that Oregon could insist on payment in coin. Concerning a state's power as to internal taxation, the Court observed:

> "The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discre-

> tion of the Legislatures to which the states commit the exercise of the power . . . There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation." (7 Wall. at 76-77).

Thus, a state's power to regulate state taxation is an attribute of sovereignty which constitutionally may not be overridden by Congress. As summarized in *Snow* vs. *Dickson,* 66 Ill.2d 443, 362 N.E.2d 1052, 1062 (1977): "Matters of state taxation are reserved to the states under the Tenth Amendment to the Constitution." See also *Thompson* vs. *Union Pacific R.R. Co.,* 76 U.S. (9 Wall.) 579, 591 (1870). Similar sovereign functions and attributes of states have been protected against encroachment by federal legislation. In *National League of Cities* vs. *Usery,* 426 U.S. 833, at 845 (1976), it was held that federal wage and hour legislation did not apply to state employees. The power of a state to locate its own seat of government also is protected. *Coyle* vs. *Oklahoma,* 221 U.S. 559 (1911).

Accordingly, under Pub. L. 91-156 Congress could not constitutionally require the imposition of state franchise taxes not enacted by the state legislature, nor compel a state official (such as the Comptroller) to collect such taxes. As stated in *Kentucky* vs. *Denison,* 65 U.S. (24 How.) 66, 16 L.Ed. 717, at 729:

> "The federal government under the Constitution, has no power to impose on a state officer, as such, any duty whatsoever, and compel him to perform it."

Similarly, *United States* vs. *Best,* 573 F.2d 1102 (9th Cir. 1978), held that a federal magistrate could not compel a state agency to suspend the appellant's California drivers license.

Pub. L. 91-156 is highly significant in that it removed existing restraints on state taxation of national banks. However, this Court has stressed that the federal amendment is not a substitute for state legislation where the latter is required. Amendment of a New York commercial rental tax statute to increase the rate was held not to constitute "affirmative action" of the state legislature as then required by the Savings Clause of Pub. L. 91-156. *Chase Manhattan Bank, N.A.* vs. *Finance Administration of the City of New* York, . . . U.S. . . . , 59 L.Ed.2d 445, 99 S. Ct. . . . (1979). The authorities discussed above establish that affirmative state legislative action always is necessary to impose state taxation. The Comptroller's Ruling was not legislative action, and the Texas Supreme Court erred by holding in effect that Pub. L. 91-156 was an effective substitute for state legislation.

2. The Texas Supreme Court's failure to apply established principles of statutory construction and to observe relevant constitutional standards constituted a denial of due process of law to Petitioner.

Pursuant to the Savings Clause (Sec. 3) of Pub. L. 91-156, in 1971 the Texas Legislature enacted H.B. 730 (App. E, at E-1 and E-2). H.B. 730 provided that the passage of Pub. L. 91-156 "shall not operate to impose or permit the imposition of any additional tax or taxes upon the *institutions* affected thereby" unless either the taxes were being imposed prior to January 1, 1971, or such institutions were "specifically designated as being subject to the additional tax or taxes by an Act of the Legislature passed subsequent to the effective date of Public Law 91-156." Franchise tax calculated as that here challenged admittedly was not being imposed in 1971, nor has the Texas Legislature taken the specified action (Findings of Fact 1, 2, 5, 6, 7 & 8, App. A at A-1 & A-2).

The Texas Court of Civil Appeals expressly held that if the federal amendment were construed as authorizing the additional tax, as an institution affected by Pub. L. 91-156 Petitioner was entitled to the protection of H.B. 730 (App. B, at B-13). The Texas Supreme Court reversed, holding that Petitioner was not an "institution" within the meaning of H.B. 730. Petitioner regards the Texas Supreme Court as a great tribunal which acted in good faith. However, in its "institution" holding that Court failed to apply long-standing principles of statutory construction, thereby depriving Petitioner of due process of law guaranteed by the Fourteenth Amendment.

H.B. 730 does not define the term "institutions." Under settled Texas law the term therefore must be accorded its ordinary meaning, or signification. Article 10, V.A.C.S. (Vernon's Annotated Civil Statutes of Texas), provides that in the construction of all civil statutes:

> "1. *The ordinary signification shall be applied to words,* except for words of art or words connected with a particular trade or subject matter. . . ." (Emphasis added).

The Texas Supreme Court repeatedly has endorsed and applied this statutory mandate. As stated in *Eddins-Walcher Butane Co.* vs. *Calvert,* 298 S.W.2d 93 (Tex. 1957), at 96:

> "In the absence of such a definition the words of the enactment will usually be given their ordinary meaning."

Again, in *Satterfield* vs. *Satterfield,* 448 S.W.2d (Tex. 1969), at 459:

> "Words in common use, when used by the Legislature in a statute are to be interpreted as intended to express the meaning in which they are ordinarily understood."

The same principle was expressed in *Addison* vs. *Holly Hill Fruit Products, Inc.* 322 U.S. 607, 88 L.Ed. 1488, at 1496:

> "Legislation, when not expressed in technical terms is . . . to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

As a corporation this Petitioner clearly is an "institution" within the ordinary, commonly understood meaning of that term, as are the other (probable) Petitioners. Indeed, the State's attorney admitted in argument before the Supreme Court of Texas that, "We will concede that Respondents (now Petitioners) are covered if the term 'institutions' is given its broad, dictionary definition." Courts consistently have employed such a definition, holding uniformly that "institution" includes public and private, business and non-profit organizations. This principle has existed at least since *Pennoyer* vs. *Neff,* 95 U.S. 714, 24 L.Ed 565, at 573 (1877). As stated in *In Re Peabody's Estate,* 21 Cal. App.2d 690, 70 P.2d 249 (1937):

> "An 'institution' is an established or organized society or corporation. It may be private in character, designed for profits for those composing the organization, or public and charitable in its purposes."

Thus, had the Texas Supreme Court given "institution" its ordinary, generally understood meaning, Petitioner would have been protected by H.B. 730. In failing to do so the Court departed from its own mandate in *Simmons* vs. *Arnim,* 220 S.W. 66, 70 (Tex. 1920):

> "Courts must take statutes as they find them. More than that they should be willing to take them as they find them . . . (the courts) are not the lawmaking body."

The Court gave no reason for departing from statute and precedent, but said that since H.B. 730 did not define "institutions" it would look to Pub. L. 91-156 for a definition. However, the federal statute neither used nor purported to define "institution," and no canon of construction holds that the definition of a statutory term should be derived from a separate statute which neither uses nor defines the term.

The Texas Supreme Court's conclusion that H.B. 730 was intended to protect only banks from the effect of Pub. L. 91-156 is unfounded and contrary to precedent. It offers no explanation of why the Legislature did not say "banks" instead of "institutions" in H.B. 730, if it meant to protect only banks. Actually, the Legislature's use of the broader term evidenced its intent to protect more ("institutions") than just banks. The Savings Clause (Sec. 3) of Pub. L. 91-156 is so similar in wording to H.B. 730 that it obviously served as a model for the Texas statute. (Please compare the statutes, App. E, at E-1 and E-2, with E-5 and E-6). The primary difference is that instead of using "banks" or "class of banks" as did the federal statute, the Texas Legislature substituted the broader term "institutions." It thus intended to expand the class of those protected. As stated in A. SUTHERLAND, *Statutory Construction,* § 45-12:

> "If a change occurs in legislative language, a change was intended in legislative result."

In *Hughes* vs. *Washington,* 389 U.S. 290 (1967) a new construction of the state constitution adopted by the state supreme court deprived a landowner of property which she had owned under pre-existing law. The United States Supreme Court reversed, finding that federal law was controlling. While the majority did not reach the due process contention, in concurring Mr. Justice Stewart declared that the state court's abrupt change in prior state law, not fore-

shadowed by existing precedents, was not entitled to "deference" as to the state law determination upon review, and raised due process issues. Mr. Justice Stewart wrote:

> "Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court." 389 U.S., at 297.

Finally:

> "Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so . . . [T]he due process clause of the Fourteenth Amendment forbids such confiscation by a State, *no less through its courts than through its legislature,* and no less when a taking is unintended than when it was deliberate. . . ." (Emphasis added). 389 U.S., at 298.

Seemingly related principles were expressed by Justices Marshall and White in *Oregon* vs. *Corvallis Sand & Gravel Company,* 429 U.S. 363, at p. 394-395:

> "Stare decisis should be more than a fine sounding phrase . . . Accordingly, "[a] substantial departure from precedent can only be justified . . . in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment."

A violation of the Fourteenth Amendment by reason of a state court's failure to follow established precedent was found in *Sotomura* vs. *County of Hawaii,* 460 F.Supp. 473 (D.C. Haw. 1978). The Hawaii Supreme Court adopted a new method of determining a property owner's seaward boundary, when all relevant precedent indicated that the opposite conclusion would be reached. Such decree was

held to be so radical a departure from precedent, prior statutory application and common law as to constitute a taking of the owner's property without just compensation. A similar decision was rendered in *Robinson* vs. *Ariyoshi,* 441 F.Supp. 559 (D.C. Haw. 1977), where the Hawaii Supreme Court had again radically modified property rights in a ruling which disregarded precedent.

Although the cited cases involved direct confiscation, they demonstrate that a state court's failure to follow established precedents and rules of construction can violate substantive and procedural due process requirements. It is respectfully submitted that the Texas Supreme Court so erred in this case. In determining the effect and scope of H.B. 730 the Court failed to follow the "plain meaning" rule as required by Art. 10, V.A.C.S., by common law, and by unbroken judicial precedent. Applying the standard expressed in *Hughes,* the decision was so radical a departure from precedent, prior construction principles and practice as to take Petitioner's property without due process of law. In that regard, the decision also departed from precedent and constitutional requirements concerning separation of powers. Only the Legislative branch has the power to impose state taxes. TEX. CONST. art. XIII, § 1. The Legislature has not acted to change the formula used to compute franchise taxes, or otherwise to impose the challenged tax. The tax thus was imposed by the Comptroller, of the Executive Branch. TEX. CONST. art. IV, § 1. Petitioner's right to due process was abridged by the Texas Supreme Court's failure to follow precedent and to enforce these constitutional requirements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Houston, Texas 77002

October . ., 1979

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. .....

REIDY INTERNATIONAL, INC., ET AL.,
Petitioners,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS;
WARREN G. HARDING, STATE TREASURER
OF THE STATE OF TEXAS; AND
MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents.

PROOF OF SERVICE

I hereby certify that on this .... day of October, 1979, three copies of the Petition of Reidy International, Inc. for a Writ of Certiorari to the Supreme Court of Texas were mailed, postage prepaid, to Gilbert J. Bernal, Esq., Assistant Attorney General of Texas, Office of the Attorney General of Texas, Post Office Box 12548, Capitol Station, Austin, Texas 78711, counsel for the Respondents. I further certify that all parties required to be served have been served.

WILLIS WITT
500 Gulf Building
Houston, Texas 77002
Counsel for Petitioner
REIDY INTERNATIONAL, INC.

APPENDIX A

IN THE

District Court

OF

TRAVIS COUNTY, TEXAS

No. 223,714

NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL

VS.

BOB BULLOCK, ET AL

FINDINGS OF FACT AND CONCLUSION OF LAW

FINDINGS OF FACT

1. The stipulations of the parties filed herein are adopted and found as fact by the Court and incorporated herein by reference.

2. Franchise Tax Ruling 80-0.18, which held that dividends and interest from national banks with principal offices in Texas were "gross receipts from business done in Texas," was promulgated as a direct result of the enactment of Public Law 91-156.

3. The publication of Franchise Tax Ruling 80-0.18 on April 18, 1974, was the first formal pronouncement of the Comptroller of Public Accounts' policy with respect to the effect of Public Law 91-156 on the Texas franchise tax treatment of dividends and interest from national banks with principal offices in Texas.

4. Acts 1971, 62nd Legislature, p. 1206, ch. 292, art. 7, § 1, codified as a footnote to article 20.02, TEX. TAX.-GEN. (Supp. 1976)

(House Bill 730), was adopted by the Legislature of the State of Texas in 1971, to be effective July 1, 1971.

5. The rule set forth in Franchise Tax Ruling 80-0.18 increased the amount of Texas franchise taxes payable by Plaintiffs and Intervenors.

6. Such increase was not being imposed prior to January 1, 1971.

7. Plaintiffs and Intervenors have not been specifically designated as being subject to such increase by any act of the Legislature passed subsequent to January 1, 1973, the eventual effective date of Public Law 91-156.

8. Prior to January 1, 1973, corporations receiving interest or dividends from Texas national banks were not required to include the same in its "gross receipts from business done in Texas" for franchise tax purposes.

9. Plaintiffs and Intervenors were subject to and paid the Texas franchise tax prior to January 1973, and have been subject to and paid the Texas franchise tax since January 1, 1973, except Intervenor Reidy which has been subject to and paid such tax since January 1, 1974.

CONCLUSION OF LAW

Plaintiffs and Intervenors were not institutions affected by the passage by Public Law 91-156 within the meaning of art. 7 of House Bill 730.

SIGNED THIS 2nd day of December, 1977.

.....

HERMAN JONES
Judge Presiding

APPENDIX B

IN THE

Court of Civil Appeals

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 12,750

NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL.,
Appellants,

VS.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS, ET AL.,
Appellees.

**FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT, NO. 223-714,
HONORABLE JAMES R. MEYERS, JUDGE PRESIDING**

Eight bank holding companies brought this lawsuit in September of 1974 to recover in excess of $2,000,000.00 in franchise taxes paid under protest to the Comptroller of Public Accounts. Subsequently, in January of 1976, one additional bank holding company intervened, and in March of 1976 an ordinary business corporation, holder of certificates of deposit of national banking associations situated in Texas, also intervened to be allied with plaintiffs. In addition to the Comptroller, the Attorney General and the State Treasurer were made parties defendant as required by statute.

The principal issue to be decided is whether the State may treat dividends (and interest) flowing from stock held

in national banks as part of the holding corporation's "gross receipts from business done in Texas" for purposes of ascertaining the franchise tax. Challenged by plaintiffs below, who are appellants, and to be tested for validity, is Comptroller's Ruling 80-0.18 (1974), which on its face claims authority for such treatment under provisions of revised 12 U.S.C. Sec. 548 (1969, effective 1973), also known as Public Law 91-156. This suit also involves interpretation of an amendment, codified under Article 20.02, V.A.C.S., Taxation-General (1971), by which Act the Legislature of Texas undertook to control the effects of the federal statute (12 U.S.C. Sec. 548) on the Texas tax system.

To place the main issue of this cause in proper focus, it is appropriate to review the statutory, administrative, and case law developments established prior to the Comptroller's Ruling of 1974, which rested upon the Act of Congress, and together spawned the controversy leading to this litigation.

Every domestic and foreign corporation, chartered or authorized to do business in Texas or doing business in Texas, must pay a Texas franchise tax pursuant to requirements of Article 12.01, V.A.T.S., Tax.-Gen. Each corporation liable for payment of a franchise tax must determine, in compliance with Article 12.02(1)(a), ". . . the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which *the gross receipts from its business done in Texas* bear to the total gross receipts of the corporation from its entire business." (Emphasis added)

The same basic franchise tax allocation formula in Article 12.02 was used in Article 7084, V.A.T.S., the source of the present statute. Article 7084 did not designate the

receipts which were to be included as the corporation's "business done in Texas," and to supply certainty, in curing the omission, administrators of the Texas franchise tax adopted the "location of payor test" in allocating receipts from intangibles to a corporation's "business done in Texas." Only receipts from intangibles paid by a payor located in Texas were considered under this test to be a part of the corporate taxpayer's business done in Texas.

Thus receipts from intangibles paid to a corporation by an out-of-state payor were not treated as within the meaning of "business done in Texas" and were not included in applying the formula. Although it was recognized by the Supreme Court of Texas that such administrative policy was not obligatory, the Court nevertheless in 1967 held that the doctrine was of such long standing it should not be changed or departed from "in the absence of clear statutory authorization." Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172, 180 (Tex. Sup. 1967).

A large portion of the gross receipts from business activities of the taxpayers in this lawsuit consists of dividends and interest received from national banks in which the several taxpayers own stock. National banks are not Texas corporations but are created under the National Bank Act (12 U.S.C. Sec. 21 et seq.) which constitutes ". . . by itself a complete system for the establishment and government of national banks." Deitrick v. Greaney, 309 U.S. 190 (1940).

Prior to the dispute in this lawsuit, the Comptroller excluded dividends and interest, flowing from stock held in national banks, from a taxpayer's "gross receipts from business done in Texas." In this case the Comptroller insists that even prior to this controversy the Comptroller could have treated national banks as domestic corporations if the Comptroller had chosen to do so. In apparent support of this contention, the Comptroller makes the singular

argument that heretofore there was some "doubt" respecting the "domicile" of a national bank, and claims that the Comptroller resolved any doubt regarding the location of the payor national bank in favor of a status as a non-Texas corporation.

The provision of 12 U.S.C. Sec. 548 (P. L. 91-156), enacted by Congress in 1969 and effective in 1973, upon which the Comptroller rests the Ruling of 1974, is in this language:

> "For the purpose of *any tax law enacted under authority of* the United States *or any State,* a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." (Emphasis added)

The Comptroller contends that any doubt regarding location of payor which the Comptroller entertained prior to 1973 was removed automatically by the Congressional Act because "An ancillary effect of the statute was to eliminate prior uncertainties as to the domicile of national banks."

Prior to its amendment by the 91st Congress in 1969, 12 U.S.C. Sec. 548 provided a list of taxes which could be imposed on national banks by state legislatures. The permissible levies named were the only taxes which could be imposed by a state on any national bank. The statute was designed explicitly to restrict the power of state legislatures in levy of taxes on national banks. See 2 U.S. Code Cong. & Ad. News (1969), p. 1594.

The restrictions imposed under 12 U.S.C. Sec. 548 prior to amendment were not applicable of course to state taxation of state banks and thereby created an inequality between state and national banks. As early as 1943, the Legislature of Texas moved to remedy this inequality with enactment of Article 342-908, V.A.T.S., by which Texas

voluntarily restricted its authority to tax state banks except in the same manner it imposed taxes on national banks.

The language of the statute, amended in 1963 and again in 1965, embodies the basic purpose and effect of the law as originally passed in 1943:

> "State and national banks are hereby declared to be within the *same class* under the Constitution and laws of this state. *It is not the intention of the Legislature to discriminate between state banks, national banks, and private banks.* To the extent that the State of Texas has power to legislate with reference to national banks, all laws of this state shall apply alike to state banks, private banks, *and national banks domiciled in this state;* and state banks and private banks shall be subject to only such taxes heretofore or hereafter imposed by the state, or any political subdivision thereof, as could lawfully be imposed upon such state banks or private banks were they operating as national banks." (Emphasis added)

Revised 12 U.S.C. Sec. 548, although enacted by Congress in 1969, was not made effective until 1973. In that interim the Legislature of Texas reacted to revision of the federal statute by enacting, among various amendments of tax statutes, Article 7 of that Act, which expressly foreclosed "any additional tax or taxes upon the institutions affected by" Public Law 91-156 (12 U.S.C. Sec. 548).

Article 7 in its full text provided:

> "Section 1. The passage of Public Law 91–156 by the Congress of the United States shall not operate to impose or permit the imposition of any additional tax or taxes upon the institutions affected thereby unless:
>
> (a) The tax or taxes were being imposed prior to January 1, 1971, or

(b) Such institutions are specifically designated as being subject to such additional tax or taxes other than the limited sales and use tax by an Act of the Legislature passed subsequent to the effective date of Public Law 91–156." (Acts 1971, 62nd Leg., p. 1193, 1206, ch. 292, Art. 7, eff. July 1, 1971; see also Note V.A.T.S. Tax.-Gen., art. 20.02).

Nearly three years later, the Comptroller, in April of 1974, published Ruling 80-0.18, the essential parts of which are set out:

"*General:* The 'location of payor' test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.02(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.

"*State Banks:* Dividends and interest paid by a bank organized under the Banking Code of Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

"*National Banks:* Prior to January 1, 1973, national banks were considered to be foreign corporations for franchise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. Public Law 91–156 amended Section 5219 of the Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.01(1)(b)."

In reliance on the Ruling of 1974, the Comptroller assessed additional franchise taxes against appellant taxpayers in the amount of $1,022,803.77 for 1974 and $1,087,731.43 for 1975. Appellants paid the taxes for 1974 under protest and within ninety days thereafter brought this action for refund, and again in 1975 the taxes were paid under protest and appellants amended their pleadings to include the taxes paid for both 1974 and 1975.

The cause was tried before the court without a jury, and the court entered judgment on June 27, 1977, that plaintiffs below take nothing by their suit. The district court's judgment was based on the court's conclusion that as a matter of law appellants were not "institutions affected by the passage of Public Law 91-156 within the meaning of" Article 7 of the Legislative Act of 1971 (Note, Article 20.02, V.A.T.S., Tax.-Gen.).

We will reverse the judgment of the trial court and will render judgment that appellant taxpayers recover the taxes assessed pursuant to Ruling 80-0.18 and paid under protest.

In addition to the conclusion of law, already the trial court found the following facts:

(1) Franchise Tax Ruling 80–0.18, which held that dividends and interest from national banks with principal offices in Texas were "gross receipts from business done in Texas," was promulgated as a *direct result* of the enactment of Public Law 91–156.

(2) The publication of Ruling 80–0.18 was the first formal pronouncement of the Comptroller's policy with respect *to the effect of Public Law 91–156 on the Texas franchise tax* treatment of dividends and interest from national banks.

(3) Acts 1971, 62nd Legislature, p. 1206, ch. 292, art. 7, Sec. 1, codified as a footnote to Article 20.02,

V.A.T.S., Tax.-Gen., was adopted by the Legislature in 1971.

(4) The rule set forth in Ruling 80-0.18 increased the amount of franchise taxes payable by the taxpayers.

(5) Such increase was not being imposed prior to 1971.

(6) The taxpayers in this suit have not been specifically designated as being subject to such increase by any act of the Legislature passed after the effective date of 12 U.S.C. Sec. 548.

(7) Prior to the effective date of revised 12 U.S.C. Sec. 548, corporations receiving interest or dividends from Texas national banks were not required to include the same in their "gross receipts from business done in Texas" for franchise tax purposes.

Appellants bring two points of error. *First,* appellants contend the trial court erred in concluding that the taxpayers are not "institutions affected" by passage of Public Law 91-156 and therefore not entitled to relief or protection purportedly provided by Article 7 of the Legislative Act of 1971, now annotated as a footnote to Article 20.02, V.A.T.S., Tax.-Gen. *Second,* appellants urge error because the trial court concluded that Public Law 91-156 automatically imposed, or permitted, without State legislation, an additional tax on appellants. In essence this claim is that revision of 12 U.S.C. Sec. 548 dealt with equal taxation of state and national banks, and that since the revised statute was not concerned with taxation of corporations owning stock in national banks, the Comptroller was without authority to use the federal statute as authority for publishing Ruling 80-0.18.

The State defends the trial court's judgment principally on three grounds: (1) that the corporate taxpayers are not

"institutions" within the meaning of Article 7 of the Act of 1971 (Art. 20.02, footnote); (2) that appellants are not "affected" by revision of 12 U.S.C. Sec. 548 within the meaning of Article 7; and (3) that the substantially increased franchise tax, resulting from Ruling 80-0.18, is not an "imposition of additional taxes" within the meaning of Article 7.

The State further contends that construction of Article 7 of the Act of 1971, as urged by appellants, would lead to an "unjust result in that it would cause inequality of taxation among banks, bank holding companies and corporations generally." This contention obviously is based on the Comptroller's view that the purpose and effect of revised 12 U.S.C. Sec. 548 is to change the preexisting franchise tax structure for corporations owning stock in national banks.

In view of this contention, we deem it more orderly to consider first the purpose of revised 12 U.S.C. Sec. 548, at issue under appellants' second point of error, and thereafter consider the import of Article 7, in the Legislative Act of 1971, at issue under the first point.

The theory of the State, that revised 12 U.S.C. Sec. 548 authorizes the Comptroller to change the State's policy on the inclusion of dividends and interest in the stockholder's "gross receipts from business done in Texas," is equivocal and wanting in consistency. The legislative history of revised 12 U.S.C. Sec. 548 shows that the specific purpose of the revision was "... to provide authorization for the *States ... to levy modern types of taxes on national banks* ..." (Emphasis added) See 2 U.S. Code Cong. & Ad. News (1969), p. 1599. The Congress believed there was "... no longer any justification for ... continuing to grant *national banks* immunities from state taxation which are not afforded state banks ..." (Emphasis added) 2 U.S. Code Cong. & Ad. News (1969), p. 1595.

In this suit the State insists that an "ancillary" and "automatic" effect of the revision was to alter the taxation of corporations owning national bank stock, but the contention is without support or a showing that such policy was of concern to the drafters of the revision or that such a change is mandated by the federal statute.

To the contrary, it appears that because Article 342-908, set out earlier, declares state and national banks equal for purposes of state taxation of the banks, revised 12 U.S.C. Sec. 548 does not abrogate the State's taxation scheme, but merely removes restrictions on state taxation of national banks, thereby enlarging taxation *permissible* for both state and national banks. As observed earlier, the specific purpose of revised 12 U.S.C. Sec. 548 was to provide authorization for the states to levy modern types of taxes on banks which were not authorized under the statute before its amendment.

Prior to revision, 12 U.S.C. Sec. 548 restricted only state taxation of national banks. The statute did not prohibit state taxation of dividends and interest flowing from stock in national banks to corporations owning such stock. The Legislature of Texas voluntarily excluded this income of corporations from "gross receipts from business done in Texas" under the doctrine of "location of payor rule," since national banks were and are created under federal law, not state law.

It does not follow that 12 U.S.C. Sec. 548, when revised to remove restrictions on state taxation of national banks, also altered a long established procedure in Texas which had been in no manner controlled by the restrictions of the statute prior to its revision. As revised, the federal statute simply allows the states to treat national banks as state banks for purpose of equal taxation of banks. The concept thus provided is for equal taxation of banks and is unrelated to taxation of dividends and interest from national bank stock in the hands of corporate stockholders.

It is also apparent that exclusion of national bank stock dividends and interest from "gross receipts from business done in Texas" by the taxpayers does not conflict with the stated purpose of the revised federal statute, and therefore no change is mandated by the revision. The ends of 12 U.S.C. Sec. 548 are not defeated by allowing a state to treat national banks as non-Texas corporations, for purposes of computing the stockholders' franchise tax, because there is no resulting inequality in the tax treatment of banks themselves. In fact, this procedure, of treating national banks as non-Texas corporations for purposes of the stockholders' franchise tax, has existed harmoniously for forty-five years with this State's system of equality for state and national banks. The Legislature made clear its intention in Article 342-908 (1943) *not* to "discriminate between state banks, national banks, and private banks."

This harmonious coexistence demonstrates that the principle of treating national banks as non-Texas corporations, for purposes of the stockholders' franchise tax, results in no discrimination between state and national banks and does not cause "inequality of taxation among banks," as urged by the Comptroller. The Comptroller's present position on this question is out of harmony with past performance. In the more than forty years since the Legislature declared state and national banks equal for purposes of state taxation of banks, the Comptroller has at no time challenged the exclusion of dividends and interest on national bank stock from the stockholders' "gross receipts from business done in Texas" on the ground that the practice created an inequality between state and national banks. The Comptroller before this Court in 1972 urged the identical proposition now advanced by the appellants and was

successful in *Silco, Inc. v. Calvert,* 482 S.W.2d 56, 59 (Tex. Civ. App. Austin 1972, writ ref'd n.r.e.). In that case this Court held: "This statute (Article 342-908) requires only that state and national *banks* be treated equally under state laws. The statute does not in any way require an equal treatment of any other corporations that are not state banks or national banks." (Emphasis added)

In the present case the trial court found that Ruling 80-0.18 was promulgated as a direct result of revised 12 U.S.C. Sec. 548. The federal statute becomes the Comptroller's only authority to support his attempt to alter the established franchise tax system, and the argument seems to be that the amended statute removed "doubt" as to "domicile" of national banks. Yet Article 342-908 made it clear that there has been no question of "domicile" simply by mandating equal treatment of state banks, private banks, and "national banks *domiciled* in this state." (Emphasis added) The question of domicile had been determined long ago without violence to compatibility of the two concepts under examination in this case. The Comptroller is committed to his own contention in *Silco, supra,* when interpreting the impact of a federal statute precisely of the same nature as Article 342-908.

The State's essential complaint appears reduced to deploring "inequality of taxation among bank holding companies and corporations generally." Since this matter of inequality presents no conflict with the revised federal statute, the Comptroller's challenge goes to the inherent inequality of the "location of payor test" itself. The Supreme Court placed that challenge beyond authority of the Comptroller in *Humble Oil & Refining Co.* v. *Calvert, supra,* and held there that the "location of payor test" may be changed only by action of the Legislature. (414 S.W.2d 180, col. 2)

We turn now to consideration of the Legislature's action in 1971 to forestall the levy of additional taxes on institutions affected by passage of Public Law 91-156.

We conclude that even if the Comptroller should be correct in the contention that the federal statute as revised had as its purpose the cure of unequal franchise tax treatment of corporations owning stock in national banks, and we have held that the statute had no such purpose, nevertheless the State may not prevail in this lawsuit. The Legislature in 1971 prohibited precisely the type of change the Comptroller undertook to make in the tax structure acting under authority claimed to be derived from 12 U.S.C. Sec. 548.

The Legislature, being aware of the revision by Congress of 12 U.S.C.A. Sec. 548, acted without delay, in fact two years before the federal statute would become operative, to anticipate changes in the State's tax system, which might be improvidently undertaken because of the federal statute, and enacted laws to prevent changes not first considered and approved by the Legislature. The legislative intent could hardly be expressed more clearly or more forcefully than in the text reading, "The passage of Public Law 91-156 (12 U.S.C.A. Sec. 548) by the Congress of the United States *shall not operate to impose or permit the imposition* of any *additional* tax or taxes upon the *institutions affected* thereby . . ." (Emphasis added)

It is the State's position that the Act of 1971 (Article 7) does not apply to bank holding companies and other corporations owning stock in national banks, and in its attempt to sustain this position the State reveals a basic flaw in the argument that the revised federal statute gives the Comptroller authority to change the established corporate franchise tax structure. The State argues that one of the purposes of the federal law was to cure unequal treatment of corporations owning stock in national banks.

The State insists that such treatment is not in keeping with the spirit of 12 U.S.C.A. Sec. 548, and that an "ancillary effect" of the statute was to correct this inequality. Further, the State claims, the greatly increased franchise tax, achieved by Ruling 80-0.18, is an "automatic effect" of the federal law and therefore the federal statute is authority for the administrative Ruling.

The State continues with the argument that the corporations owning stock in national banks are *not* "institutions affected" by the federal statute within the meaning of the Act of 1971 (Article 7) because the federal amendment was adopted by Congress to cure unequal treatment of *banks* and therefore *banks* are the only "institutions affected."

Thus it is clear that the Comptroller attempted to use a federal statute as authority for increasing the franchise tax payable by these appellants by more than one million dollars annually and yet claim that the federal law does not "affect" these institutions. The finding of the trial court that Ruling 80-0.18 was promulgated as a *direct result* of revised 12 U.S.C. Sec. 548, and the further finding that the Ruling was the formal pronouncement of the Comptroller's policy, with respect to the *effect* of the federal law on the Texas franchise tax, make inescapable the conclusion that the Comptroller acted on belief that 12 U.S.C. Sec. 548 *permits the imposition* of increased taxes and that the federal law in fact "affected" appellant corporations in the ordinary dictionary sense. Appellants were *affected* when the *effect* produced was "the imposition of any additional tax or taxes" upon them, actually, in this case, at the annual rate of more than one million dollars.

It appears that the only remaining question is whether the required inclusion of dividends and interest in the stockholders' "gross receipts from business done in Texas,"

resulting in substantially increased taxes, constitutes "the imposition of any additional tax or taxes" within the meaning of Article 7. We hold that inclusion of the dividends and interest, resulting in significant increases in the franchise tax of appellants, amounted to "imposition of ... additional ... taxes," in contravention of the prohibition the Legislature enacted in Article 7 of the Act of 1971. *Yoakum Industries, Inc.* v. *Calvert*, 414 S.W.2d 171 (Tex. Sup. 1967); *Calvert* v. *Electro-Science Investors, Inc.*, 509 S.W.2d 700 (Tex. Civ. App. Austin 1974, no writ).

Upon the holdings and reasoning stated, we reach the conclusion that the Comptroller acted without authority and in contravention of an explicit Act of the Legislature in promulgating and enforcing Ruling 80-0.18 to increase the franchise taxes of appellant corporations owning stock in national banks, and that the additional taxes collected ought to be refunded to the taxpayers.

The judgment of the trial court is reversed, and judgment is rendered that appellant taxpayers recover the taxes paid under protest as shown by the record in this cause.

.....

TRUEMAN E. O'QUINN
Associate Justice

Reversed and Rendered

Filed: July 12, 1978

Associate Justice Shannon
not participating

APPENDIX C

IN THE

Supreme Court of Texas

FROM TRAVIS COUNTY THIRD DISTRICT

No. B-7896

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Petitioners,

v.

NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL.,
Respondents.

This is a suit by certain taxpayers against the comptroller of public accounts to recover in excess of $2,000,000.00 in franchise taxes paid under protest.[1] The trial court denied relief, but the court of civil appeals reversed the lower court judgment, rendering judgment that the taxpayers recover all sums paid. 569 S.W.2d 584. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

The basic facts of this case are undisputed and may be briefly summarized. Taxpayers are eight national bank holding companies, which have derived income from na-

[1] The plaintiffs and respondents in this suit are National Bancshares Corp. of Texas, Cullen/Frost Bankers, Inc., Southwest Bancshares, Inc., Texas American Bancshares, Inc., on its own behalf and as successor in interest to Southern National Corp., First City Bancorporation of Texas, Inc., First United Bancorporation, Inc., Mercantile Texas Corporation, as successor in interest to Federal Capital Corporation, Fort Sam Houston Bankshares, Inc. (by intervention), and Reidy International, Inc. (by intervention).

tional bank shares, and one ordinary business corporation, which has derived income from a national bank certificate of deposit. In April of 1974 the comptroller of public accounts issued a ruling which provided that dividends and interest paid on or after January 1, 1973 by a national bank located in this state are includable in the corporate payee's gross receipts for the purpose of assessing a franchise tax. The taxpayers paid the franchise tax under protest and subsequently brought this suit to recover sums paid.

The central issue presented is whether the comptroller correctly ruled that interest and dividends derived from national banks located in this state are includable in the corporate payee's Texas gross receipts for the purpose of assessing a franchise tax. The taxpayers contend, and the court of civil appeals has held, that an act of the Texas Legislature, 1971 Tex. Gen. Laws, ch. 292, art. 7 § 1, at 1206, codified as a footnote in TEX. TAX.-GEN. ANN. art. 20.02 (Vernon Supp. 1978-1979) (hereinafter article 7, section 1), precludes such inclusion. We cannot agree. It is our opinion that the legislature merely intended to preclude the additional taxation of banks and did not intend to preclude a franchise tax upon other, unmentioned corporate entities.

Unless otherwise provided by law, a franchise tax is imposed upon all domestic and foreign corporations doing business in Texas. *See* TEX. TAX.-GEN. ANN. arts. 12.01 to 12.22 (Vernon 1969 & Supp. 1978-1979). The granting of the privilege to transact business in this state confers economic benefits, including the opportunity to realize gross income and the right to invoke the protection of local law. The Texas franchise tax is a tax on the value of this privilege. *General Dynamics Corp.* v. *Bullock,* 547 S.W.2d 255, 257-58 (Tex. 1976); *Texaco, Inc.* v. *Calvert,* 526 S.W.2d 630, 633 (Tex. Civ. App. — Austin 1975, writ ref'd n.r.e.);

see Ford Motor Co. v. *Beauchamp,* 308 U.S. 331, 334-35 (1939) (holding Texas franchise tax constitutional).

The formula employed to compute a corporation's franchise tax is designed to achieve a tax commensurate with the value of the privilege granted. *General Dynamics Corp.* v. *Bullock, supra* at 257; *United North & South Development Co.* v. *Heath,* 78 S.W.2d 650, 652 (Tex. Civ. App. — Austin 1934, writ ref'd). This is accomplished by dividing the gross receipts from business done in Texas by the gross receipts from the entire business. The resulting allocation percentage is multiplied by the total taxable capital and, in turn, the product of this calculation (capital taxable by Texas) is multiplied by the current tax rate. The final product of this calculation is the sum of the corporation's franchise tax liability from business done in Texas.[2] TEX. TAX.-GEN. ANN. arts. 12.01 & 12.02 (Vernon 1969 & Supp. 1978-1979); *see Humble Oil & Refining Co.* v. *Calvert,* 414 S.W.2d 172, 173 n. 1 (Tex. 1967); *Texaco, Inc.* v. *Calvert, supra* at 632; Note, 5 HOUS. L. REV. 132, 133 (1967).

To determine what receipts from intangibles should be allocated to business done in this state, Texas employs the location of payor test. *Humble Oil & Refining Co.* v. *Calvert, supra at* 175. Under this test, the domicile of the debtor or payor in the case of interest or dividends is dispositive and not the domicile of the taxpaying corporate payee. If dividends or interest are received from a Texas corporation, they are Texas receipts. Conversely, if received from a foreign corporation, they are not Texas receipts. *Id.* at 175; Note, 5 HOUS. L. REV. 134 (1967).

Historically, the comptroller did not include dividends or interest income received from a national bank located in

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[2] $\frac{\text{Gross Receipts in Texas}}{\text{Gross Receipts of Entire Business}} = \text{Allocation Percentage} \times \text{Entire Taxable Capital} = \text{Capital Taxable By Texas} \times \text{Tax Rate} = \text{Franchise Tax}$

Texas in the corporate payee's Texas gross receipts. *See Silco, Inc.* v. *Calvert,* 482 S.W.2d 56, 59 (Tex. Civ. App. — Austin 1972, writ ref'd n.r.e.). This was because national banks, as opposed to state-chartered banks, were considered foreign corporations. Thus, under the location of payor test, income received from state-chartered banks was includable in Texas gross receipts, but income received from national banks was not equally includable. *Id.* at 58-59.

In April of 1974 the comptroller issued ruling 80-0.18 which is set forth in full in the margin.[3] This ruling essentially provides that effective January 1, 1973 income received from national banks located in Texas is taxable on the same basis as income received from state-chartered banks. The comptroller based this change in taxation policy on Pub. L. 91-156, 83 Stat. 434 (codified at 12 USC § 548 (Supp. 1979)) (hereinafter Pub. L. 91-156), which became

[3] "General: The 'location of payor' test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.01(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.

"State Banks: Dividends and interest paid by a bank organized under the Banking Code of Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

"National Banks: Prior to January 1, 1973, national banks were considered to be foreign corporations for francise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. Public Law 91-156 amended Section 5219 of the Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02 (1)(b)."

effective January 1, 1973.[4] That congressional enactment provided that for the purposes of any state tax law a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Applying the location of payor test, the comptroller concluded that dividends and interest received from national banks located in Texas constituted Texas gross receipts in the hands of the corporate payee.

The taxpayers in this case contend that the comptroller is precluded by an act of the Texas legislature from including income received from national banks located in this state in their Texas gross receipts. Article 7, section 1 provides:

> The passage of Public Law 91–156 by the Congress of the United States shall not operate to impose or permit the imposition of any additional tax or taxes upon the *institutions affected thereby* unless:
>
> (a) The tax or taxes were being imposed prior to January 1, 1971, or
>
> (b) Such institutions are specifically designated as being subject to such additional tax or taxes other than the limited sales and use tax by an Act of the Legislature passed subsequent to the effective date of Public Law 91–156.

Id. (Emphasis added). The taxpayers reason that corporate payees of national bank dividends and interest — specifically, national bank holding companies and corporate holders of national bank certificates of deposit — are "institutions affected" by Pub. L. 91-156.

[4] Pub. L. 91-156 provides:

> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Id.

Before we undertake a determination of what institutions are affected by Pub. L. 91-156 within the meaning of article 7, section 1, we note that the present taxpayers' contention is tantamount to a claim for exemption from the franchise tax. Statutory exemptions from taxation are subject to strict construction since they are the antithesis of equality and uniformity and because they place a greater burden on other taxpaying businesses and individuals. *Hilltop Village, Inc.* v. *Kerrville Independent School District,* 426 S.W.2d 943, 948 (Tex. 1968); *accord, Air Force Village Foundation* v. *Northside Independent School District,* 561 S.W.2d 905, 909 (Tex. Civ. App. — El Paso 1978, writ ref'd n.r.e.). An exemption cannot be raised by implication, but must affirmatively appear, and all doubts are resolved in favor of taxing authority and against the claimant. Simply stated, the burden of proof is on the claimant to clearly show that it comes within the statutory exemption. *Aransas Hospital, Inc.* v. *Aransas Pass Independent School District,* 521 S.W.2d 685, 689 (Tex. Civ. App. — Corpus Christi 1975, writ ref'd n.r.e.); *Space Precision Machining Co.* v. *State,* 503 S.W.2d 289, 291 (Tex. Civ. App. — Austin 1973, writ ref'd n.r.e.).[5]

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[5] Professor Sands summarizes the rule thusly:

> As a general rule, grants of tax exemptions are given a strict interpretation against the assertions of the taxpayer and in favor of the taxing power. As explained in court opinions: "Exemptions from taxation claimed under legislative acts should be rigidly construed and established beyond a reasonable doubt. It is only where a deliberate purpose of the legislature to grant an exemption is expressed in clear and unequivocal terms that a claim to an exemption can be maintained." "Taxation is the rule and exemption therefrom the exception; and the claimant of such an exemption must show his right thereto by evidence which leaves the question free from doubt. The claimant for an exemption must show that his demand is within the letter as well as the spirit of the law."

3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 66.09, at 207 (1972 & Supp. 1979).

We now turn to an examination of article 7, section 1. This statute states that there shall be no additional taxation of "institutions affected" by Pub. L. 91-156. Since an exemption from taxation must affirmatively appear and since there is no affirmative indication in article 7, section 1 of what corporations the term "institutions" was intended to encompass, we must refer to Pub. L. 91-156. The only "institutions" mentioned or referred to in that statute are "banks."

Although we adhere to the strict construction rules aforementioned, an examination of the history of Pub. L. 91-156 is helpful to an understanding of its intended effect. Behind the passage of this statute is the long-settled rule that the several states cannot tax national banks except as permitted by Congress. This limitation on the states' taxation power is founded on the theory that national banks are chartered by the United States government and that the federal power is supreme over its instrumentalities. *First Agricultural National Bank* vs. *State Tax Commission,* 392 U.S. 339, 340 (1968); *see* MITCHIE ON BANKS AND BANKING 348-49 n. 6 (1971). Historically, this meant that state-chartered banks were subject to some types of state taxation that national banks were exempt from. A good example of this disparity in tax treatment is provided by *Grayson County State Bank* vs. *Calvert,* 357 S.W.2d (Tex. Civ. App. — Austin 1962, writ ref'd n.r.e.). In that case it was held that a state franchise tax could constitutionally be levied against a state bank although the same tax could not be levied against a national bank located in this state. The court reasoned that national and state banks were not within the same class; rather, a national bank could transact business within state boundaries without the state's permission and without paying for the privilege. *Id.* at 162. A concurring justice noted this "inequitable condition" and called upon the Texas legislature to rectify the tax disadvantages under

which state banks were forced to compete with national banks. *Id.* at 163. One year later the Texas legislature responded with an amendment to article 342-908 of the Texas Revised Civil Statutes. That article presently provides that state-chartered banks are subject only to such taxes that lawfully can be imposed by Texas on national banks located in the state.[6] In effect, this means that both national and state banks are equally exempt from many forms of state taxation in Texas.

Although Texas achieved tax parity among state and national banks with this amendment, many other states had not totally or effectively remedied the disadvantageous tax position of their state-chartered banks.[7] The United States Congress accordingly reacted to this nationwide problem in 1969 with the passage of Pub. L. 91-156. The legislative history of that enactment reveals that the intended effect was to remove the prohibition against states "to levy modern types of taxes on national banks" to the same extent and in the same manner that they presently have the right to tax state-chartered banks. S. Rep. No. 91-530, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. Code Cong. & Ad. News 1599, 1599, 1594-98. The Congress concluded that there was no longer any justification for continuing to grant national

[6] Tex. Rev. Civ. Stat. Ann. art. 342-908 (Vernon 1973) provides:

> State and national banks are hereby declared to be within the same class under the Constitution and laws of this state. It is not the intention of the Legislature to discriminate between state banks, national banks, and private banks. To the extent that the State of Texas has power to legislate with reference to national banks, all laws of this state shall apply alike to state banks, private banks, and national banks domiciled in this state; and state banks and private banks shall be subject to only such taxes heretofore or hereafter imposed by the state, or any political subdivision thereof, as could lawfully be imposed upon such state banks or private banks were they operating as national banks.

[7] *See* Note 8, *infra*.

banks immunities from state taxation that were not enjoyed by state-chartered banks.[8]

Thus, the only institutions affected by Pub. L. 91-156 are "banks." Not one of the taxpayers in this case, however, can be characterized as a "bank."[9] A national bank holding company is a company which has control over a bank, but it is not chartered or statutorily empowered to transact

[8] S. Rep. No. 91-530, 91st Cong. 1st Sess.; H. Rep. No. 91-728, 91st Cong., 1st Sess., reprinted in [1969] U.S. Code Cong. & Ad. News 1595. The Senate Committee on Banking and Currency reported:

> Some States have exempted State banks from liability for any State taxes which national banks are required to pay. There, the State may or may not have attempted to achieve equality between banks and other businesses by taxing banks at a higher rate on the allowable taxes than other businesses pay. This type of device is at best uncertain.
>
> Regardless of the method employed by the particular State in an attempt to achieve equality, there is always a question of whether it has actually been achieved, be it equality between State and National banks, or equality between banks and other businesses.
>
> There may have at one time been justification for giving national banks privileges and immunities which were denied State banks, under the theory that national banks are peculiarly an instrumentality of the Federal Government, and, as such, hold a unique and distinct position from that of other institutions. *Without specifically addressing the question of whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks.*

Id. at 1595 (emphasis added); *see Lake County National Bank* v. *Kosydar*, 305 N.E.2d 799, 802 (Ohio 1973); Mitchie on Banks and Banking 350 n. 11 (1971 & Supp. 1979) (purpose of Pub. L. 91-156 is to remove immunity from state taxation).

[9] A "bank" may be defined as an "*institution* organized under the laws of the United States . . . the District of Columbia, [or] any territory of the United States . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 USCA § 1841(6)(c) (1969 & Supp. 1979) (emphasis added).

banking business. 12 U.S.C.A. § 1841(a)(1) (1969 & Supp. 1979); P. HELLER, HANDBOOK OF FEDERAL BANK HOLDING COMPANY LAW 1-52 (1976). A corporate holder of a bank certificate of deposit is clearly not a bank, but merely a creditor of the bank. *Southview Corp.* v. *Kleberg First National Bank,* 512 S.W.2d 817 819 (Tex. Civ. App. — Corpus Christi 1974, no writ); 10 Am.Jur. 2d *Banks* § 455 (1963).

This strict, but literal, construction of the pertinent statutes leads to only one reasonable conclusion. By passage of article 7, section 1, our legislature sought to address the congressional effort to remove federal barriers to equal tax treatment of state and national banks. Texas, unlike some other states, had previously equalized taxation among state and national banks and the legislature doubtlessly intended to maintain this parity by precluding any additional taxation of those institutions. Stated differently, there is no reason for us to presume that the legislature sought to exempt national bank holding companies and corporate holders of national bank certificates of deposit from a franchise tax computed on income received from national banks located in this state.

Moreover, an exemption from taxation cannot be extended to a taxpayer merely because it is related to or connected with a tax-exempt corporation. In *Silco, Inc.* v. *Calvert,* 482 S.W.2d 56 (Tex. Civ. App. — Austin 1972, writ ref'd n.r.e.), the court was faced with a contention similar to the one advanced by the national bank holding companies in this case. The taxpayer, Silco, Inc., was a holding company comprised of four tax-exempt corporations, including one state bank and one state savings and loan. The comptroller assessed a franchise tax against Silco which was computed on the interest and dividends which Silco had received from its four subsidiary corporations. Silco filed suit to recover the tax paid, contending that its corporate

components were exempt from franchise taxation and that logic and equity dictated that such extensions should be extended to Silco itself. The trial court held for the comptroller and the court of civil appeals affirmed. The court stated that Silco was connected with its tax-exempt components through ownership, but held that the parent corporation and its components were separate legal entities. Silco could not bring itself within the exemption statute by the mere fact that its capital was invested in the stock or securities of a corporation exempted from the tax. *Id.* at 58. Likewise, we do not believe that national bank holding companies are entitled to an exemption merely because the legislature has continued the franchise tax exemption for the national banks.

We therefore hold that the comptroller correctly ruled that, under the location of payor rule, interest and dividends derived from national banks located in this state are includable in the corporate payee's Texas gross receipts for the purpose of assessing a franchise tax. To hold otherwise would mean that the Texas legislature intended to continue the unequal treatment between recipients of income from state banks and recipients of income from national banks. This we cannot accept. Rather, we believe that the legislature merely intended to preserve the status quo in reference to taxation of banks, both national and state, until it chose to impose additional taxation at a later time.

The judgment of the court of civil appeals is accordingly reversed and the judgment of the trial court is affirmed.

. . . . . .

SEARS MCGEE
Justice

OPINION DELIVERED: June 20, 1979.

APPENDIX D

THIS SIDE OF CARD IS FOR ADDRESS

Mr. Willis Witt, Attorney

500 Gulf Building

Hoston, Texas 77002

CLERK'S OFFICE - SUPREME COURT

Austin, Texas, July 25, 1979

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of BULLOCK ET AL. v. NATIONAL BANCSHARES CORPN. ET AL., No. B-7896 was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX E

CONSTUTIONAL AND STATUTORY PROVISIONS AND ADMINISTRATIVE RULING INVOLVED

A. The Tenth and Fourteenth Amendments to the United States Constitution.

1. Amendment X:

The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. Amendment XIV, Sec. 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. United States Code, Title 12, Section 548.

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

C. 1971 Tex. Gen. Laws, ch. 292, art. 7, § 1, at 1206, originally part of House Bill 730, now codified as a footnote in TEX. TAX.-GEN. ANN. art. 20.02 (Supp. 1976).

SECTION 1. The passage of Public Law 91-156 by the Congress of the United States shall not operate to impose or permit the imposition of any additional tax or taxes upon the institutions affected thereby unless:

(a) The tax or taxes were being imposed prior to January 1, 1971, or

(b) Such institutions are specifically designated as being subject to such additional tax or taxes other than the limited sales and use tax by an Act of the Legislature passed subsequent to the effective date of Public Law 91-156.

D. Ruling 80-0.18 of the Comptroller of Public Accounts of the State of Texas, promulgated April 18, 1974.

1. *General*

The "location of payor" test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.02(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.

2. *State Banks*

Dividends and interest paid by a bank organized under the Banking Code of Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

3. *National Banks*

Prior to January 1, 1973, national banks were considered to be foreign corporations for franchise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. Public Law 91-156 amended Section 5219 of the Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority

of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.01(1)(b).

E. Act of Dec. 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, the permanent provisions of which are codified as 12 U.S.C. § 548 (1970 & Supp. V 1975).

NATIONAL BANKS — STATE TAXATION

For Legislative History of Act, see p. 1594

PUBLIC LAW 91-156: 83 STAT. 434

[H. R. 7491]

An Act to clarify the liability of national banks for certain taxes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SECTION 1. *Temporary amendment of section 5219, Revised Statutes*

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended by adding at the end thereof the following:

"5. (a) In addition to the other methods of taxation authorized by the foregoing provisions of this section and subject to the limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within

such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

"(b) Except as otherwise herein provided, the legislature of each State may impose, and may authorize any political subdivision thereof to impose, the following taxes on a national bank not having its principal office located within the jurisdiction of such State, if such taxes are imposed generally throughout such jurisdicition on a nondiscriminatory basis:

"(1) Sales taxes and use taxes complementary thereto upon purchases, sales, and use within such jurisdiction.

"(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.

"(3) Taxes (including documentary stamp taxes) on the execution, delivery, or recordation of documents within such jurisdiction.

"(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction.

"(5) License, registration, transfer, excise, or other fees or taxes imposed on the ownership, use, or transfer of tangible personal property located within such jurisdiction.

"(c) No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969.

"(d) As used in this paragraph 5, the term 'State' means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam."

(b) The amendment made by subsection (2) of this section shall be effective from the date of enactment of this Act until the effective date of the amendment made by section 2(a) of this Act.

SECTION 2. *Permanent amendment of section 5219, Revised Statutes*

(a) Section 5219 of the Revised States (12 U.S.C. 548)[40] is amended to read:

"Sec. 5219. For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

(b) The amendment made by subsection (a) becomes effective on January 1, 1972.

SECTION 3. *Savings provision*

(a) Except as provided in subsection (b) of this section, prior to January 1, 1972, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.

(b) The prohibition of subsection (a) of this section does not apply to

(1) any sales tax or use tax complementary thereto,

(2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or

(3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,

imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof.

SECTION 4. *Study by Board of Governors of the Federal Reserve System*

(a) The Board of Governors of the Federal Reserve System (hereinafter referred to as the "Board") shall make a study to determine the probable impact on the banking systems and other economic effects of the changes in existing law to be made by section 2 of this Act governing income taxes, intangible property taxes, so-called doing business taxes, and any other similar taxes which are or may be imposed on banks. In conducting the study the Board shall consult with the Secretary of the Treasury and appropriate State banking and taxing authorities.

(b) The Board shall make a report of the results of its study to the Congress not later than December 31, 1970. The report shall include the Board's recommendations as to what additional Federal legislation, if any, may be needed to reconcile the promotion of the economic effciency of the banking systems of the Nation with the achievement of effectiveness and local autonomy in meeting the fiscal needs of the States and their political subdivisions.

Approved December 24, 1969.

APPENDIX F

DEPARTMENT OF BANKING

[LETTERHEAD]

Mr. Robert C. Holland, Secretary
Board of Governors
Federal Reserve System
Washington, D. C. 20551

Dear Mr. Holland:

In response to your recent inquiry, the following represents my views on the question submitted by the Board:

(1) In Texas, the "permanent amendment" of Section 5219 will not improve the competitive position of state banks relative to national banks. The Texas Banking Code (Article 342-908, Vernon's Texas Civil Statutes) provides that state banks shall be subject only to such taxes as could lawfully be imposed on them were they operating as national banks. State and national banks are declared to be within the same class under the constitution and laws of Texas.

(2) In my judgment, there is a need for a provision in the Federal statute prohibiting any State from imposing any tax or use of any method of taxation applicable to banks [or the shareholders of banks] which differs from taxes or methods of taxation applicable to an ordinary business corporation or the shareholders of an ordinary business corporation. The Texas Constitution requires that all taxes be equal and uniform and the Legislature has enacted appropriate laws permitting political subdivisions of the State to require property owners to render their property (real and personal, tangible and intangible) for equal and uni-

form taxation. Thus, it is the responsibility of the owner of corporate stock in an ordinary business corporation to render the shares for taxation.

Banks, and banks only, are single out for special treatment, however. Under Article 7166, Vernon's Texas Civil Statutes, banks are required to file with the local tax assessor a statement reflecting "the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him." The statute goes on to provide in part:

> "The taxes due upon the shares of banking corporation shall be a lien thereon, and no banking corporations shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same."

In order to facilitate the payment of dividends and transfer of shares, most, if not all, Texas banks actually pay the taxes on shares on behalf of their shareholders. The tax rate applying to bank shares and other corporate shares is equal and uniform, I believe. This would seem fair, except as a practical matter it is difficult if not impossible for a tax assessor to require or enforce the rendition of ordinary corporate stock owned by citizens of the State. As a result bank shares are the only class of shares of corporate stock which reach the tax rolls with any degree of uniformity or regularity.

There are other reasons for a provision in the Federal statutes like the one suggested above. Banks are tied to their domicile, whereas the ordinary business

corporation can move to another jurisdiction to avoid onerous tax treatment. The State constitutional requirement that taxes be equal and uniform sounds good, but the problems of providing alleged tax discrimination are often so burdensome and expensive that they become prohibitive, especially to a small bank.

(3) Texas does not permit banks chartered by other States to qualify to do business in our State.

(4) One development at the State and local levels was the imposition of sales tax to banks by virtue of a ruling by the Texas Comptroller of Public Accounts. It is possible the Comptroller might take a similar position after January 1, 1972, with regard to the Texas franchise tax which heretofore has not applied to banks because of the previous language in Section 5219. (Savings & loan association and insurance companies are specifically exempted from the franchise tax, incidentally, as they also are taxed under special state statutes similar to the bank stock tax.)

If the franchise tax were applied to banks they clearly would be carrying a greater tax burden than savings & loan associations and, I believe, insurance companies and most ordinary business corporations. In fact, banks are probably carrying a heavier tax burden under present law than such associations, companies and corporations.

Very truly yours,

Robert E. Stewart
Commissioner

APPENDIX G

IN THE

District Court

OF TRAVIS COUNTY, TEXAS
53RD JUDICIAL DISTRICT

No. 223,714

NATIONAL BANCSHARES CORPORATION OF TEXAS; FROSTBANK CORPORATION; SOUTHWEST BANCSHARES, INC.; TEXAS AMERICAN BANCSHARES, INC.; FIRST CITY BANCORPORATION OF TEXAS, INC.; FIRST UNITED BANCORPORATION, INC.; SOUTHERN NATIONAL CORPORATION; FEDERATED CAPITAL CORPORATION,

Plaintiffs,

VS.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; JESSE JAMES, STATE TREASURER OF THE STATE OF TEXAS; AND JOHN L. HILL, JR., ATTORNEY GENERAL OF THE STATE OF TEXAS,

Defendants.

STIPULATION OF DEFENDANTS AND OF INTERVENOR REIDY INTERNATIONAL INC.

Intervenor Reidy International Inc. ("Intervenor"), by and through its duly authorized attorneys of record, and Defendants Bob Bullock, successor in office to Robert S. Calvert as Comptroller of Public Accounts of the State of Texas, Jesse James, Treasurer of the State of Texas, and John L. Hill, Jr., Attorney General of the State of Texas, by and through their duly authorized attorney of record,

hereby stipulate and agree for the purposes of the above entitled and numbered cause that the following facts are true and correct and may be found as such by the Court and that said facts are sufficient for the disposition of this matter. Neither party concedes, however, the relevancy or materiality of any particular stipulated fact and such shall be free to argue that any particular fact is irrelevant and immaterial. Any party may offer additional evidence not contradictory to the facts as stipulated.

1. Intervenor Reidy International Inc. is a corporation duly organized in 1974 under the laws of the State of Texas, with its principal office and place of business in Houston, Texas. Its address is 1100 Milam, #2170, Houston, Texas, 77002. Its principal activity is oil and gas exploration, which has been conducted (in association with other business entities) in several states, but not in Texas.

2. Intervenor timely filed its first year Texas franchise tax report for the period September 26, 1974, through April 30, 1976.

3. With respect to the franchise tax period from September 26, 1974, to April 30, 1976, Intervenor timely paid to the Comptroller first year Texas franchise taxes in the amount of $8,156.34, $8,070.09 of which was paid pursuant to a timely filed written protest accompanying said payment as required by Art. 1.05(1), Tex. Tax.-Gen. Ann. The protest letter transmitting Intervenor's payment set forth fully and in detail each and every ground and/or reason why it was contended that the Comptroller's demand for such payment was unlawful and unauthorized.

4. The Petition in Intervention of Reidy International Inc. was timely filed pursuant to Art. 1.05(2), Tex. Tax.-Gen. Ann. Intervenor has been properly joined as a party to this proceeding pursuant to Rule 60 of the Texas Rules of Civil Procedure.

5. This Court has jurisdiction over this suit by virtue of Art. 1.05(2), Tex. Tax.-Gen. Ann.

6. Intervenor Reidy International Inc. is a Texas corporation doing business in Texas and is required to compute and pay a Texas franchise tax to the State of Texas upon that portion of its taxable capital allocable to the State of Texas in accordance with the formula set forth in Art. 12.02(1), Tex. Tax.-Gen. Ann.

7. Intervenor holds a certificate of deposit issued by a national banking association whose principal office is located in Texas. Subject to confirmation upon audit by the Comptroller's office it is stipulated that during the period covered by Intervenor's said first year Texas franchise tax report, by reason of such certificate Intervenor received accrued interest of $23,833.33 from such national bank, and that during said period such interest constituted Intervenor's gross receipts from business done in Texas.

8. Prior to January 1, 1973, national banks with principal offices in Texas were considered by the Comptroller to be foreign corporations and the dividends and interest paid by such national banks were not includable in "gross receipts from business done in Texas" for purposes of Art. 12.02(1), Tex. Tax.-Gen. Ann.

9. On April 18, 1974, the Comptroller published Franchise Tax Ruling No. 80-0.18, a true and correct copy of which is attached as Exhibit "A" to the Stipulation of Plaintiffs, Defendants and Intervenor Fort Sam Houston Bancshares, Inc. "Plaintiffs' Stipulation"), requiring inclusion of dividends and interest received from national banks with principal offices in Texas on or after January 1, 1973, in "gross receipts from business done in Texas" for purposes of the formula set forth in Art. 12.02(1), Tex. Tax.-Gen. Ann.

10. For the franchise tax period involved in this proceeding, Intervenor complied with Franchise Tax Ruling No. 80-0.18 and, subject to timely filed protest, included interest received from a national bank whose principal office is located in Texas as gross receipts from business done in Texas in computing its Texas franchise tax. Such inclusion resulted in Intervenor's franchise tax for the taxable period involved herein being greater than it would have been without such inclusion. The exact amount of the increased franchise tax due to such inclusion is subject to verification by the parties.

11. Texas state banks have been exempt from the Texas franchise tax since August 23, 1963.

12. National banks with their principal offices in Texas have always been exempt from the Texas franchise tax.

13. Attached as Exhibit "B" to Plaintiffs' Stipulation is H.B. 918, as originally filed on March 6, 1973, in the House of Representatives, 63rd Legislature.

14. Attached as Exhibit "C" to Plaintiffs' Stipulation is H.B. 918, as reported to the floor of the House of Representatives, 63rd Texas Legislature, by the Committee on Revenue and Taxation on April 24, 1973.

15. Further consideration of H.B. 918 was postponed by the House of Representatives on May 18, 1973, and no further action was taken on said bill by the 63rd Legislature prior to its mandatory adjournment on May 28, 1973.

16. Intervenor Reidy International Inc. owns no stock in any national, state or private bank situated in Texas.

17. It is further stipulated and agreed that Intervenor need not present further evidence of the dollar amount of the judgment to which it is entitled by virtue of the decision by the Court. Such amount plus interest thereon shall be

verified by the parties, computed and paid according to the law applicable thereto.

Respectfully submitted,

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